IN THE

Supreme Court of the United States

No. 77-1073

LEE PHARMACEUTICALS,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent.

DEN-MAT, INC., ROBERT IBSEN, W. RICHARD GLACE, FRED H. BROCK AND PROFESSIONAL PRODUCTS CO.,
Real Parties In Interest.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Lee Pharmaceuticals respectfully petitions this Court for a writ of certiorari to review an order of the Court of Appeals for the Ninth Circuit, filed November 3, 1977.

OPINIONS BELOW

The Court of Appeals delivered no opinion. Its order, (App., p. 1a) is unreported. The bench opinion of the Honorable Martin Pence delivered September 14, 1977 (App., pp. 10a to 30a) is likewise unreported, as are the antecedent relevant orders of the Honorable Albert Stephens and Senior Judge Jesse W. Curtis (App., pp. 3a to 9a) and the subsequent formal order of Judge Pence, filed November 14, 1977 (App., 31a).

JURISDICTION

The order of the Court of Appeals was filed November 3, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May the federal judiciary defy Congressional intent by construing the mandate of 28 U.S.C. 455(a), a remedial statute enacted in 1974 to improve public confidence in the judiciary by requiring a judge to disqualify himself whenever his "impartiality might reasonably be questioned", to render it (a) coextensive with the personal bias and prejudice disqualification provisions of 28 U.S.C. § 144 and 455(b)(1), and also by (b) arbitrarily imposing upon it the decisional shellac with which the lower federal courts effectively immobilized 28 U.S.C. § 144 for some fifty years?

2. Does the proper implementation of 28 U.S.C. 455 (a) require a consideration of all evidence germane to whether a judge's impartiality might reasonably be questioned, including, without limitation, psychiatric evidence?

3. Did Congress intend by 28 U.S.C. 455(a) to repudiate not only

(a) the judicially created principle that judges have an overweening "duty to sit" in assigned cases which compels a narrow construction of the ambit of disqualification statutes, but also

(b) other judicially fashioned strictures upon 28 U.S.C. 144 which have in the past led to the denial of disqualification motions premised on actual personal bias and prejudice, *inter alia*,

(i) if exhibited against counsel rather than a party,

(ii) if arising within the context of a case rather than outside its record, and

(iii) if manifested only by occurrences, such as expressions of pronounced unilateral judicial discourtesy and antipathy toward a party, on the record of pending litigation?

4. Is postponement of appellate review of an order denying judicial disqualification sought pursuant to 28 U.S.C. 455(a), until after the controversy in which the challenge arose has been fully determined with unfettered participation of the challenged judge, tantamount to denial of the challenging litigant's right to a fair trial before a tribunal that both *is, and appears to be*, completely fair and impartial?

5. Is a judge who demonstrates on the record of a case

(a) a callous insensitivity toward truth, ethics and simple fairness,

(b) an inability to behave in a calm, detached, impersonal and apparently impartial manner,

(c) a marked discourtesy, impatience, skepticism and rancor toward one party before him and its counsel, and

(d) a profound lack of respect for the established procedures and usages of law as set forth in federal and local rules,

all to the prejudice of only one party to a pending case and the advantage of its opponent, obligated to disqualify himself under 28 U.S.C. 455(a) when challenged?

6. Does a federal judge *per se* create a reasonable question as to his own impartiality by not only authorizing *ex parte* discussion between his law clerk and one of the parties to litigation pending before him concerning a matter in controversy, but severely castigating the op-

posing party and its counsel for filing a motion to obtain full disclosure of the particulars of all such *ex parte* contacts and dismissing their motion as moot in view of certain self-serving, uninformative affidavits given by his law and docket clerks?

STATUTES INVOLVED

28 U.S.C. §§ 455(a) and (b)(1):

> "§ 455. Disqualification of justice, judge, magistrate, or referee in bankruptcy
>
> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . .".

28 U.S.C. § 144:

> "§ 144. Bias or prejudice of judge.
>
> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within

> such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

STATEMENT OF THE CASE

Petitioner is the plaintiff in an action, No. 75-2311, pending before Senior Judge Jesse W. Curtis of the respondent United States District Court for the Central District of California, wherein the second amended complaint seeks damages and injunctive relief for defendants' misappropriation of trade secrets, infringement of three patents and five trademarks and other acts of unfair competition. In lengthy answers the various defendants deny the allegations of this complaint and in also lengthy counterclaims, two defendants seek damages for alleged federal and state antitrust law violations, false patent marking and unfair competition.

Commencing on October 27, 1976, the district judge entered a series of largely *sua sponte* orders of an unprecedented character, whereby admittedly "unusual and innovative procedures" were substituted for those defined in the Federal Rules of Civil Procedure, to petitioner's prejudice and defendants' advantage. These procedures included, by way of nonlimiting example, all of the following:

> (i) the *sua sponte* subordination, without notice or opportunity to be heard and without any change in circumstances, of petitioner's pending preliminary injunction application re trade secret, trademark and related unfair competition issues to an early and separate trial on the issue of patent validity, even though (a) there had to that point been no discovery on patent validity and (b) this subordination was contrary to earlier orders representing the established law of the case,

(ii) the *sua sponte* announcement—subsequently slightly modified but never wholly rescinded and also without notice or opportunity to be heard—that the issue of patent validity would be tried solely to the court, an edict in the teeth of jury trial demands from both sides,

(iii) a refusal to permit petitioner to discover any information relevant to patent validity and favorable to the patents, that might be in defendants' custody, control or possession,

(iv) a refusal to permit petitioner to obtain other discovery needed to rebut defendants' patent validity challenge and,

(v) the *sua sponte* edict, again without notice or opportunity to be heard, that in lieu of a judicial ruling on the merits of defendants' already pending Rule 37 motion re interrogatory and documentary discovery concerning trade secrets, trademarks, and related unfair competition, a master would be appointed to supervise the trade secret issues—this notwithstanding the absence of Rule 52(b) findings or facts on which they could be premised.[1]

Efforts to obtain reasoned reconsideration of the first wave of these unusual orders, including requests to be heard orally as to the inappropriate character of the various *sua sponte* judicial fiats, were unavailing. Also unavailing were efforts to obtain appellate review (1) under 28 U.S.C. 1292(a)(2) of the *de facto* denial of petitioner's preliminary injunction application, effected by inordinate and indefinite delay of hearing it,[2] and (2)

[1] The October 27, 1976 orders also resumed and perpetuated a discovery "freeze" precluding any party from taking discovery without prior leave of court which had first been imposed *sua sponte* in December 1975 but had been relaxed in May 1976 to permit defendants only to pursue unlimited discovery on trade secrets, trademarks and related unfair competition for a sixty day period.

[2] Despite contrary precedent from other circuits—e.g., *United States* v. *Lynd*, 301 F.2d 818 (5 Cir. 1962); *Dellinger* v. *Mitchell*, 442 F.2d 782 (D.C. Cir. 1971)—the Ninth Circuit dismissed the appeal on the ground that the orders which effected the *de facto* denial were nonappealable.

under 28 U.S.C. 1651, by supervisory mandamus, of Judge Curtis' curtailment of petitioner's jury trial and other rights to a fair trial and a fair opportunity to prepare for trial.[3]

During the course of these various efforts, however, it became plain to petitioner that:

a). Hand-in-hand with his abandonment of the prevailing federal and local civil procedural rules, Judge Curtis had also recklessly abandoned any effort to deal truthfully with the facts, as manifested by (i) his entry of various fact findings in formal court orders, to petitioner's detriment only, which were either contrary to or wholly unsupported by the facts of record and (ii) his subsequent adamant refusal to correct these erroneous fact findings when his attention was drawn to their inaccuracies.

b). With the authorization of Judge Curtis, his law clerk in December 1976 held at least one *ex parte* telephone conference with defendants' counsel concerning a matter in controversy between the parties. After this conference, a ruling adverse to petitioner was made.

c). Judge Curtis showed himself to be markedly reluctant to place on the record all the facts concerning *ex parte* contacts between his staff and the defendant, even to the point of launching a scathing and vituperative attack on petitioner and its counsel for their temerity in formally moving for such a disclosure. The motion was dismissed as "moot" in view of the self-serving affidavits of his own law and docket clerks, which do not even touch upon the detailed facts of what transpired in the

[3] The mandamus petitions were simply summarily denied, presumably under General Order 4 of the Ninth Circuit, App., pp. 70a-71a.

one *ex parte* conversation about a question in controversy that the law clerk confessedly had with defendants' counsel, and are in other respects less than a complete revelation of the information sought.

d). As particularly first revealed at the January 10, 1977 hearing, Judge Curtis has permitted himself to become emotionally embroiled in Civil Action 75-2311 to a point where he is regularly uncivil and discourteous to the petitioner and its counsel and appears unable to maintain the cool, calm and detached judicial mien that litigants have a right to expect from federal judges. At this hearing, Judge Curtis went so far as to fine petitioner's counsel in the arbitrarily selected sum of $1,200 for daring to file a formal motion for reconsideration, on legal grounds, of two of his orders granting motions by defendants to strike certain affirmative defenses to their counterclaims.

e). Judge Curtis, as affirmatively demonstrated by statements in two of his formal orders, had predetermined the preliminary injunction application adversely to petitioner, even though he had also refused to hear *any* of the relevant evidence.[4]

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[4] Specifically, in an order dated November 23, 1976, entered December 1, 1976, emphasizing Judge Curtis' adherence to his *sua sponte* subordination of the various issues on which a preliminary injunction application had been filed to the issue of patent validity, on which no such application was pending, he stated that "on the present state of the record, this court would not issue a temporary injunction prohibiting the issuance of trade secrets. . . .".

In a further order dated December 1, 1976 and entered December 6, 1976, Judge Curtis extemporized:

"If a hearing on the requested preliminary injunction were to be held on the present record, the injunction would have to be denied. Rather than preserving the status quo, such an injunction would prevent the defendants from selling their products under the trademarks now in use and from using several manufacturing processes currently employed. This would seriously hinder, if not completely destroy, the defendants' business, without there ever having been an opportunity of discovering the details of the claimed secrets or of proving either nonuse or invalidity of these secrets."

Deeming that these revelations were important evidence of a departure from the rigorous standard of conduct demanded by 28 U.S.C. 455(a), whereby a federal judge must not only *be*, but must in all respects *appear to be*, completely impartial, petitioner on February 11, 1977 moved that Judge Curtis be disqualified from sitting further in Civil Action 75-2311.[5] Concurrently with this motion, petitioner separately moved for reference of the disqualification issue to another judge of the district court for decision.

Defendants did not appear in regard to either motion. Nevertheless, on February 18, 1977, in Order No. 48, App., p. 3a, Senior Judge Curtis, without oral hearing, expressly denied the disqualification motion and *sub silentio* denied the motion for reference of the disqualification issue to another judge. This order is premised upon:

(1) a reckless accusation, later demonstrated to be false, that petitioner's counsel filed the disqualification motion because "she has become angry with this court because of a series of adverse rulings which apparently have frustrated her litigation strategy" (App., p. 3a).

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[5] Senate Report 93-419, 93rd Cong., 1st Sess. (1973) at p. 3 and House Report 93-1453, 93rd Cong., 2d Sess. (1974) at p. 2 note that before 28 U.S.C. 455(a) was enacted, the existence of "dual standards, statutory and ethical", of judicial conduct had "the effect . . . in some circumstances, to weaken public confidence in the judicial system." These reports further emphasize that to improve and strengthen such confidence, Congress essentially codified the 1973 American Bar Association Code of Judicial Conduct in 28 U.S.C. 455, thereby adopting and endorsing the rigorous "appearance" standard of judicial conduct defined in *Commonwealth Coatings Co.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968). See e.g., Note, "The Elusive Appearance of Propriety: Judicial Disqualification Under Section 455", 25 DePaul L. Rev. 104 (1975); Frank, "Commentary on Disqualification of Judges-Canon 3C", 1972 Utah L. Rev. 377 (1972).

(2) a subjective review of Judge Curtis' *own* "*recollection* of the record" (App., p. 3a; emphasis added) which led to the convenient conclusion "that there are no facts upon which the impartiality of this court might reasonably be questioned" (ibid.) and

(3) Judge Curtis' *own* articulation of the judicially created "duty to sit" doctrine [6] which, together with various other doctrines of judicial origin, has been utilized for more than 50 years to devitalize the bias and prejudice statute, 28 U.S.C. 144.[7]

Because of the inaccurate cornerstone fact premise of Order No. 48 that anger of petitioner's counsel prompted the motion to disqualify, petitioner on March 4, 1977 filed a renewed and supplemental motion for disqualification of Judge Curtis, again requesting a reference to another judge for decision. This motion was supported by (i) an affidavit of petitioner's president to the effect that the motion was filed because he personally deemed that Judge

[6] I.e., "The court recognizes its responsibility to view plaintiff's accusations objectively and impartially and to disqualify itself if its 'impartiality might reasonably be questioned.' But this court also recognizes its responsibility to pursue with all diligence the management of a case assigned to it and make such judgments from time to time as circumstances require to the end that the controversy may be expeditiously litigated and a fair and just result obtained" (App., p. 3a).

[7] One of the major purposes of 28 U.S.C. 455(a) as expressed in its legislative history was *abolition* of the "duty to sit", which was deemed by Congress to have rendered 28 U.S.C. 144 virtually useless in persuading a judge to disqualify himself, even when reasonable, objective and disinterested observers would believe he should do so. See, e.g., S.R. 93-419 at p. 5; H.R. 93-1453 at p. 5, see also generally "Hearings before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, United States Senate, 93rd Cong., 1st Sess. on S-1064" (1973), hereinafter "Senate Hearing" and "Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 93rd Cong., 2d Sess. on S-1064" (1974), hereinafter "House Hearings".

Curtis had failed to display the attitude of objective impartiality to which every litigant is entitled, which also stated the bases for his beliefs, (ii) a solemn certificate of the falsely accused counsel that neither her anger nor any other personal emotion of hers formed any part of the motive for petitioner's filing of the disqualification motion and (iii) a further memorandum pointing to new incidents that had occurred since the filing of the original disqualification motion, which additionally evidenced the impropriety of Judge Curtis' continued participation under 28 U.S.C. 455(a).

The supplemental motion was denied in Order No. 49 (App., p. 5a) on March 8, 1977, four days after its filing. Defendants again made no appearance. This order

(1) expressly refuses to refer the disqualification issue to another judge, holding "I would consider it an abdication of my duty to assign this motion to any other judge for a ruling". (App., p. 5a).

(2) concludes "As set forth in my order dated February 18, 1977 that *in my judgment*, there is no basis upon which this court's impartiality might reasonably be questioned" (App., p. 5a, emphasis added) and thereby admits that Judge Curtis decided the motion based upon the legislatively overruled *subjective* standard of the predecessor to 28 U.S.C. 455(a), squarely repudiated by Congress in its enactment of the latter [8] and,

(3) purports to "find nothing in the additional papers [i.e., the Lee affidavit, the certificate of counsel and the

[8] Under the predecessor to 28 U.S.C. 455(a), a judge was required to disqualify himself if it would be "improper, *in his opinion*, for him to sit . . ." (emphasis added). Both S.R. 93-419 and H.R. 93-1453 stress the intent of Congress to repudiate this *subjective*—and wholly impotent—standard of judicial conduct by adopting the objective and rigorous "appearance" standard of 28 U.S.C. 455(a).

accompanying memorandum] which would justify this court in changing its original ruling" [9] (App., pp. 5a-6a).

On May 2, 1977, Lee Pharmaceuticals filed its petition for writ of mandamus in the Court of Appeals for the Ninth Circuit seeking to compel Judge Curtis to refrain from sitting further in Civil Action 75-2311, on the ground that his conduct had shown that his impartiality might reasonably be questioned under 28 U.S.C. 455(a).[10] The mandamus petition set forth some eleven "marked departures from detached impartiality" by Judge Curtis and, in a thirty-one page section, exposed the details of these eleven specific incidents. According to a letter of the Clerk of the Ninth Circuit Court of Appeals (App., p. 67a) this petition was not conveyed to the "motion panel" until July 5, 1977. On July 12, 1977, *one* week later, it was denied by a summary order (App., p. 2a) presumably entered pursuant to Ninth Circuit General Order No. 4 (App., p. 70a) and based upon a conclusion by the motion panel that the "subject matter is not appropriate for writ procedure".[11] Under this general

[9] This implicit adherence to the false accusations against petitioner's counsel first advanced in Order No. 48 is notably at odds with the *appearance of impartiality*. A truly detached judge would be expected to make an effort to correct the record, *regardless* of whether or not he continued to refuse to disqualify himself.

[10] Judge Pence's subsequent bench opinion, *e.g.*, App. pp. 13a-14a, in part deals inappositely with a motion to disqualify filed May 19, 1977 which was not premised on 28 U.S.C. 455(a) but upon Judge Curtis' confession of lack of "expertise" requisite to deal with trade secret issues of the case. *That* motion is inapposite here, even as it actually was before Judge Pence, and hence is not otherwise treated in this petition.

[11] This presumption is consistent with the Ninth Circuit's essentially contemporaneous explanation in *Bauman* v. *United States District Court*, 557 F.2d 650, 653-4 (9 Cir. 1977) that it has virtually abandoned the use of supervisory mandamus because

> "Unprincipled use of that power could also operate to undermine the mutual respect that generally and necessarily marks the relationship between federal trial and appellate courts. Further, without articulable and practically applicable guidelines to govern the issuance of extraordinary writs, appellate judges would continually be subject to the temptation to grant such relief merely because they are sympathetic with the purpose of petitioners' underlying actions, or because they question the trial court's ability to direct the litigation efficiently or impartially."

In short, litigants in the district courts of the Ninth Circuit are at the mercy of any trial judge who runs amok or otherwise succumbs to a temptation to behave in an undisciplined or unprincipled manner. No succor from the Ninth Circuit is to be expected until after the trial court has done its worst.

order, such a summary denial is "not [to] be regarded as a decision on the merits".

While the mandamus petition was pending, petitioner referred its entire text, plus all of its exhibits, to a qualified psychiatric practitioner with both civil and criminal forensic experience, Dr. Leon Yochelson, with the request that he formulate an independent professional opinion as to whether Judge Curtis' "impartiality might reasonably be questioned". On July 13, 1977, Dr. Yochelson supplied his conclusions in the form of an affidavit (App., p. 34a), which includes the following averments:

> "11. Based solely upon my review of the aforementioned Exhibit A and Exhibit B documents and having neither read nor considered any other part of the record in Civil Action 75-2311 JWC, it is my professional opinion that the conduct of Judge Jesse W. Curtis in Civil Action No. 75-2311 JWC is such that his impartiality might reasonably be questioned; It is my further opinion that the conduct of Judge Curtis demonstrates that he is strongly disposed against the plaintiff and its counsel.
>
> "12. In my professional opinion, based on my reading of only the papers which are Exhibits A and B, Judge Curtis has demonstrated by his conduct that he is not capable of a detached and objective determination of the question of whether his

impartiality in Civil Action No. 75-2311 JWC might reasonably be questioned." (App., p. 36a).[12]

This affidavit was filed in the Ninth Circuit Court of Appeals on July 15, 1977 as part of a request for reconsideration of the July 12, 1977 order. A summary denial of reconsideration was entered by that court on July 26, 1977 (App., p. 2a).[13]

On July 20, 1977, however, Judge Curtis addressed a "Memorandum to Chief Judge Stephens" (App., p. 7a) in which (a) he asserted for the first time that he had earlier refused to disqualify himself "upon the ground that the only basis for disqualification which has been cited is that I have made several rulings adverse to the plaintiff" (App., p. 7a) [14] and (b) in view of paragraph 12 of the Yochelson affidavit, he sought appointment of "some judge outside of this district . . . to review the case and my conduct and to determine whether there is any basis upon which my impartiality might reasonably be questioned". (App. pp. 7a-8a)

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[12] The affidavit also avers that Dr. Yochelson has had no previous association of any nature with plaintiff or its counsel and has not personally examined Judge Curtis, but has formulated his opinion solely on the paper record of the mandamus petition.

[13] On August 19, 1977, petitioner filed a petition, No. 77-259 in this Court for review of that ruling. Subsequently, petitioner moved for dismissal thereof pursuant to this Court's Rule 60(2) when it became apparent that the September 14, 1977 hearing before Judge Pence had rendered it advisable to seek further Ninth Circuit review before any action by this Court.

[14] This belated reinterpretation of the earlier orders denying disqualification distorts the record. It obviously constitutes an effort to equate 28 U.S.C. 455(a) to 28 U.S.C. 144 and, on that basis, to bring the operative facts here within the umbrella of § 144 precedent—such as, e.g., *Botts* v. *United States*, 413 F.2d 41 (9 Cir. 1969), which holds in essence that the conduct of a judge in a pending case provides no basis for his disqualification, but affords only a reason for appeal.

Petitioner's timely motion to stay proceedings pending such appointment and review, its objection to certain facets of the procedure and its motion to define a fair procedure for such review were all denied, even though defendants made no comment with respect to any of them. On August 19, 1977, however, Chief Judge Stephens of the respondent court formally appointed the Honorable Martin Pence, nominally of the District of Hawaii, "to review the affidavits and averments filed in the above captioned case in support of plaintiff's contention that Judge Curtis should be disqualified and to determine whether there is any basis upon which his impartiality might reasonably be questioned." (App., 9a).

Essentially concurrently, on August 22, 1977, petitioner filed a further renewed and supplemental motion to disqualify Judge Curtis pursuant to 28 U.S.C. 455, detailing the many additional instances of his departure from the strict appearance of impartiality standard that occurred after the March 8, 1977 date of Order No. 49.[15]

On August 29, 1977, petitioner sought emergency mandamus relief from the Ninth Circuit to preclude Judge Pence from proceeding and for a stay pending this Court's

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[15] These instances are described in the excerpt from the subsequent mandamus petition, No. 77-3361, App., at 43a to 66a, especially at 49a to 66a.

They include the branding of petitioner's counsel as "contemptuous" in a formal court order and the subsequent refusal to hold a contempt hearing or expunge the epithet on the ground that such counsel, "though clearly contemptuous, has not been charged with contempt".

Significantly, counsel's appeal from the latter ruling under the collateral order doctrine of *Cohen* v. *Beneficial Loan Co.*, 337 U.S. 541 (1949) was summarily dismissed as not based upon an appealable order by a Ninth Circuit two-judge motion panel on November 23, 1977, thus leaving counsel effectively remediless for this gratuitous judicial slur.

A timely request for in banc rehearing has not yet been acted upon.

ruling on the availability of certiorari in No. 77-259, note , *supra*. The focus of this petition was that, absent preliminary vacation of Judge Curtis' Orders 48 and 49, review thereof by another judge of coordinate jurisdiction constrained by "law of the case" doctrine—see, e.g., *ACF Industries, Inc.* v. *Guinn*, 384 F.2d 15 (5 Cir. 1967)—would be, at best, a futile exercise. A summary denial of this petition was entered September 1, 1977. Meanwhile, the district court clerk scheduled a hearing before Judge Pence on all facets of whether Judge Curtis should be disqualified under 28 U.S.C. 455 (a) for September 14, 1977.[16]

At this hearing, petitioner's counsel orally reviewed in detail for over an hour many highlights of Judge Curtis' conduct which establish that his impartiality *may* "reasonably be questioned", including many incidents that occurred after March 8, 1977. After brief remarks from defendant's counsel, Judge Pence then excused himself for about ten minutes and returned to deliver an obviously substantially preformulated, hour-long bench opinion (App., pp. 10a-30a) denying disqualification.

In this opinion, Judge Pence in substance

1) failed to deal with or consider any instances of challenged conduct that occurred after March 8, 1977, even though these incidents reflect a clear propensity to ignore the ethical constraints of the Code of Judicial Conduct and a marked disregard for truth and fairness. See the excerpt, App., pp. 43a to 66a from petitioner's subsequently filed mandamus petition, No. 77-3361, which describes in detail at 49a to 66a the challenged post-March 8 conduct.[17]

[16] Judge Pence was thus to review Orders 48 and 49 and also to rule *de novo* on petitioner's supplemental and renewed motion filed August 22, 1977.

[17] Judge Pence was understood by petitioner to have orally denied the August 22, 1977 supplemental motion to disqualify, notwithstanding his failure to consider these incidents. In a written order filed November 14, 1977 (App., p. 31a) Judge Pence confirmed and formalized the denial, without specific comment on how he purports to justify the conduct involved in the face of § 455(a).

2) refrained from mentioning the Yochelson affidavit, paragraph 11, quoted *supra*, p. 13, concerning which he earlier flatly refused to hear discussion and stated: "Just leave that out. . . . I will simply say . . . that the impartiality of a judge is not going to be judged by, determined by a psychiatrist".

3) identified himself personally with Judge Curtis in ruminations in which he analogized the attempts to disqualify himself in other cases and manifested extreme sensitivity about the "rights" of a judge presiding over a case, albeit no concern whatever for every litigant's *right* to be heard before a judge who not only is, but appears to be, scrupulously impartial, or for improving the current sorry state of public confidence in the judicial system. See, e.g. App., p. 19a, 20a.

4) held that, even under § 455(a), the party seeking disqualification must point to evidence of *actual personal* bias or prejudice stemming from an extrajudicial source, usually comprising facts outside the record of the case, before that party can be taken seriously.

5) held that a judge has a "right" to behave unreasonably, arbitrarily and discourteously to one party to a pending case before him on a selective basis—and that such behavior is not evidence that his "impartiality may reasonably be questioned" (e.g., App., p. 23a).

6) held that judges are entitled, notwithstanding specific Canon 3A4 of the Code of Judicial Conduct, or its more general Canon 2, to communicate *ex parte* with "either party" (App., p. 21a) to a case about controverted matters through their law clerks.

7) in short, treated 28 U.S.C. 455(a) as essentially coextensive with 28 U.S.C. 144 and 28 U.S.C. 455(b)(1)

and engrafted upon 28 U.S.C. 455(a) the anesthetizing judge-made rules which have rendered Section 144 a virtual nullity for at least fifty years.

On October 11, 1977, petitioner again sought appellate review by mandamus of the disqualification issue, this time in the context of Judge Pence's bench ruling. In particular, the Ninth Circuit was requested to direct the respondent district court that:

> "1. 28 U.S.C. 455(a), enacted in 1974, is henceforth to be applied and construed consistently with its legislative history and its plain language to disqualify a district judge whenever 'his impartiality *might reasonably be questioned*' on *any* basis and is *not* to be narrowed by judicial interpretation which either
>
> (a) renders it coextensive with 28 U.S.C. 144 and 28 U.S.C. 455(b)(1), or
>
> (b) imposes the same judicial gloss that the opinions of the federal courts superimposed upon 28 U.S.C. 144 over approximately the last 50 years.
>
> 2. Specifically, 28 U.S.C. 455(a) is to be construed and applied based on the understanding that it
>
> (a) repudiated the judicially ordained principle that a judge has a 'duty to sit' in the cases to which he is assigned which compels (i) a reluctance to grant motions seeking disqualification and (ii) a niggardly construction of the ambit of the disqualification statutes;
>
> (b) also repudiated, as inapplicable to the appearance standard of § 455(a), various judicially created legal doctrines by which 28 U.S.C. 144 has been strictly construed to deny disqualification whenever allegations of *actual* bias or prejudice were based on circumstances arising in a pending case; and

> (c) established the principle that all evidence, including medical evidence and evidence of conduct arising in the case itself, relied on by any party and relevant within the scope of Rule 26(b)(1) to whether a judge's impartiality might reasonably be questioned is to be considered under 28 U.S.C. 455(a)."

In an order filed by the Ninth Circuit on November 3, 1977, this petition was summarily denied without comment—presumably pursuant to that Court's General Order 4 and the doctrine of *Bauman* v. *United States District Court, supra.*

Senior Judge Curtis continues even currently to behave in an undisciplined manner, to vent personal emotion against petitioner and its counsel, and to disregard the ethical canons of the Judicial Code and the established procedures and usages of the law as defined in the extant rules. As recently as January 9, 1978, he not only purported to grant a summary judgment in defendants' favor on trademark issues—in face of a motion to extend petitioner's time for response necessitated, in the view of its counsel, by Judge Curtis' own failure to rule upon the availability to petitioner's officers and employees of certain "restricted information" affidavits relied upon to support defendants' summary judgment case,[18] and in derogation of his oral promise of November 7, 1977 that "if you need some additional time [to answer the summary judgment motion], you will have it" (November 7, 1977 Tr., p. 9, ll. 6-7)—but he stated:

> "There is pending a motion to continue to extend the time within which the plaintiffs may submit additional information on the trademark issue, but I

[18] Significantly, this is a motion on which a prompt ruling was orally promised at the November 7 hearing. Despite four subsequent formal written reminders of the need for a ruling and one informal request to the judge's docket clerk that a ruling be made, none has been forthcoming to date.

have already given one extension and nothing has been filed. I do not see any real good cause having been shown why that material has not been filed, expect that I suspect, from reading the trademarks and examining the trademarks—or the trade names and the trademarks from which they are alleged to infringe, it seems apparent on the face that there is no infringement.

I would therefore feel that it is unlikely that Ms. Sears would be able to furnish the Court with any information which would assist the Court in that decision. I think that is largely the reason why there has not been anything supplied.

It is very obvious in the face of these trademarks and the trade names are different and there is no chance of infringing. So, on that issue, I will grant the motion for summary judgment on the trademark issue and the unfair competition allegations in Count Two." (January 9, 1978 transcript, p. 5a, 19 to p. 6, l. 14)

Notably, petitioner has been permitted *no* discovery whatever on these issues since it was first permitted to plead them in a January 1976 amended complaint.

While Judge Curtis subsequently rescinded this grant of summary judgment and instead placed petitioner under an order to show cause why summary judgment should not be granted, it remains manifest that (1) he has prejudged the matter without seeing petitioner's opposition papers and (2) he has so acted based on a subjective fact finding of his own that the trademarks in issue "are different", in derogation of Rule 56 and all parties' jury trial demands.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. *The questions presented yield to no others in current importance to the proper functioning of the judicial system.*

The legislative history of § 455(a)[19] leaves no reasonable doubt that it was intended by Congress to remedy the recognized ineffectuality of preexisting judicial disqualification statutes, including § 144, to the end that the public could have confidence in the impartiality and fairness of the judicial process.[20]

The remedial statute has nonetheless been interpreted below—and is increasingly being interpreted by a significant number of lower federal courts[21] as if it were the identical twin of § 144. These courts, including the district court in this case, are taking the tack that a judge's "impartiality may *reasonably* be questioned" under § 455 (a) *only* if a *personal* bias and prejudice based upon

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[19] Senate Report No. 93-419, 93rd Cong., 1st Sess. (1973); House Report No. 93-1453, 93rd Cong., 2d Sess. (1974); Senate Hearings *supra;* House Hearings, *supra;* Thode, Reporter's Notes to Code of Judicial Conduct (1973); see also the Frank article and the DePaul L. Rev. Note cited *supra*, note 5, n. 9 and Note, "Disqualification of Judges and Justices in the Federal Court", 86 Harvard L. Rev. 760 (1973); Note, "Disqualifying Federal District Judges Without Cause", 50 Washington L. Rev. 109 (1974).

[20] As Senator Birch Bayh, a member of the Senate Committee that passed on § 455(a), put it "No statute creates more distrust than does the Section 144 procedure for disqualification for prejudice". Senate Hearings, p. 13.

[21] See, e.g., *Davis* v. *Board of School Commissioners of Mobile County*, 517 F.2d 1044 (5 Cir. 1975); *Parrish* v. *Board of Commissioners of Alabama State Bar*, 524 F.2d 98 (5 Cir. 1975); *Simonsen* v. *General Motors Corp.*, 425 F. Supp. 574 (E.D.Pa. 1976); *Honneus* v. *United States*, 425 F. Supp. 164 (D. Mass. 1977); *Fong* v. *American Airlines, Inc.*, 431 F. Supp. 1334 (N.D. Cal. 1977); *United States* v. *Corr*, 434 F. Supp. 408 (S.D.N.Y. 1977); *Hawaii-Pacific Venture Capital Corp.* v. *Rothbard*, 437 F. Supp. 230 (D. Hawaii 1977).

some extrajudicial fact or occurrence pursuant to § 144 can be proved.[22] This interpretation derogates Congressional judgment that § 455(a) represented a sorely needed reform and undermines the objective of improving public confidence in the fairness and impartiality of the judiciary.

In part, the sabotage of Congressional intent that is effectively occurring in the lower courts may result from the failure of Congress to specify what procedure is to be utilized, including who shall determine the issue of whether "impartiality might reasonably be questioned" and what evidence is to be considered, in order properly to implement § 455(a)'s new statutory standard of judicial conduct. Significant genuine confusion has been occasioned by lower court efforts to rationalize § 144 *procedure* with § 455(a)'s new standard and to puzzle out the procedural effect, if any, of the repeal of the predecessor statute's requirement for recusation "whenever, in his opinion" it would be improper for a judge to continue to sit. Indeed, the Seventh Circuit has commented on "the philosophical dilemma created by the objective—subjective conundrum" which results from the circumstances that

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[22] To illustrate, in *United States* v. *Corr*, *supra*, one respected district judge put it that "The test under that provision [i.e., § 455(a)] is not the subjective belief of the defendant or that of the judge, but whether facts have been presented that, assuming their truth, would lead a reasonable person reasonably to infer that bias or prejudice existed, thereby foreclosing impartiality of judgment" 434 F. Supp. at 412-13.

But the plain language and the legislative history of § 455(a), suggest a far broader test was intended, and that a reasonable inference of partiality might be drawn from any of limitless facts, *not* solely because of the probability of *personal* bias or prejudice extraneous to the record in the strict § 144 sense. Indeed, if Congress had meant to equate "partiality" under § 455(a) to "personal bias or prejudice", it seemingly would have selected those very words for § 455(a), particularly since they do appear in §§ 144 and 455(b)(1).

> ". . . no factual or concrete examples of the appearance of impartiality were provided in the Congressional debates. Moreover, because a judge must apply the standard both as its interpreter and its object, the general standard is even more difficult to define." [23]

Actually, for a challenged judge to himself rule on the appearance of his own conduct would seem to run afoul of Coke's famous principle, *aliquis non debet esse judex in propria causa* [24]—no man shall be a judge in his own case—a principle long ago adopted as the common law rule in this country. See *Spencer* v. *Lapsley*, 61 U.S. (How.) 264, 266 (1858).

Since this common law rule is one of the premises for the existence of disqualification statutes, Spencer, *supra*, 61 U.S. (How.) at 270; see all Frank, Disqualification of Judges, 56 Yale L.J. 605, 626-30 (1947), it may be asked whether it is implicit in § 455(a) that someone other than the challenged judge shall evaluate the appearance of his conduct.

In reluctant deference to the similar conclusion, arrived at on medical grounds, asserted in paragraph 12 of the Yochelson affidavit, *supra*, pp. 13-14, Judge Curtis, of course, asked Chief Judge Stephens to obtain a different judge outside the district to review Orders 48 and 49 (App,. pp. 3a-6a). Any objectivity that such an appointment *might* have imported into the proceeding below, however, was negated by (i) the failure to vacate Orders 48 and 49 to permit *de novo* determination by the new judge, (ii) the fact that Judge Pence was only nominally from another district, having been on special assignment to the Central District of California for nearly a year at the

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[23] *SCA Services, Inc.* v. *Morgan*, 557 F.2d 110, 116 (7 Cir. 1977).

[24] I Coke Institutes,* 141a; Dr. Bonham's Case 8 Co. Rep. 113b 77 Eng. Rep. 646 (K.B. 1609).

time of appointment, and (iii) the personal sympathy and sense of communion for Judge Curtis that Judge Pence manifestly entertains.

The lower courts are obviously both powerless and psychologically ill-equipped to devise procedures that will make § 455's objective test work. This Court *could* do so, however—and in the interest of improving society's trust in the judiciary, should take the opportunity to do it now.

This issue of public confidence in the judicial system is incandescent. As recently as January 8, 1978, one-third of the CBS television network's weekly "Sixty Minutes" was devoted, in the specific context of the conduct of Chief Judge Ritter of the District of Utah, to whether a judge should continue to sit in cases involving parties —in his case, especially the federal government and the State of Utah—toward whom he has behaved in a selectively discourteous, nondetached, emotional manner, exhibiting an arbitrary predisposition to rule adversely, *regardless* of the apposite facts or law. That Joseph Goulden's "The Benchwarmers",[25] dealing with conduct of questionable competence, integrity and impartiality by sitting federal judges, was recently a popular bestseller, further shows the widespread public concern, reaching well beyond the bounds of bench and bar, that the judicial system function in a manner deserving of society's confidence.

The ultimate interpretation and application of § 455 (a) *a fortiori* will profoundly affect the public consensus on whether our judicial system works. If that interpretation be left to the lower federal courts, to continue as Judges Curtis and Pence did in this case, to disembowel § 455(a), so as to avoid real or fancied personal embarrassment to the judges themselves, the public will inevitably react adversely.

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[25] Weybright and Talley (1974).

2. *The decision below conflicts importantly with decisions from other lower federal courts.*

a) The decision below conflicts with recent decisions of the Tenth Circuit insofar as it purports to hold that a judge's words on the record of a case demonstrating "feelings of hostility" toward a party, *United States* v. *Bray*, 546 F.2d 851, 856 (10 Cir. 1977), or its counsel, *United States* v. *Ritter*, 540 F.2d 459 (10 Cir. 1976), or implying prejudgment of an issue, *Webbe* v. *McGhie Land Title Co*, 549 F.2d 1358 (10 Cir 1977), are neither evidence that his "impartiality may reasonably be questioned" under § 455(a) nor cause for requiring him to disqualify himself pursuant to that section.

Judge Pence purported to rule in effect, that these Tenth Circuit cases, all relating to excesses committed by the aforementioned Judge Ritter, are *sui generis*, confessedly basing this determination on his personal opinions of the individuals involved. But the § 455(a) standard is an objective legal standard —and presumably the Tenth Circuit would apply it to *any judge* who behaved similarly to Judge Ritter, in any case, including Judge Curtis in this case.

The conflict is a broad one, moreover, since the cases from the Fifth Circuit and from various district courts cited in note 21, *supra*, are in agreement with the courts below in this case, while the Eighth Circuit in *Reserve Mining Co* v. *Lord*, 529 F.2d 181, 185-6 (8 Cir 1976)—albeit without citing § 455(a)—has clearly adopted the standard espoused in the cited Tenth Circuit cases. So has the Seventh Circuit in *SCA Services* v. *Morgan*, 557 F.2d 110, 114 (7 Cir. 1977) which holds that pre-§ 455(a) precedent affords "no guidance" in interpreting the new statute.

b) The ruling in this case that judges are entitled to confer *ex parte* through their law clerks with only one of the parties to a case about an issue in contro-

versy conflicts squarely with the pre-§455(a) Third Circuit holding in *Rapp* v. *Van Dusen*, 350 F.2d 806 (3 Cir. 1965) adopted by the Tenth Circuit in *Texaco, Inc.* v. *Chandler*, 354 F.2d 655 (10 Cir. 1965) that any *ex parte* comunication between a judge and one party to a pending case about issues in that case creates an appearance of impropriety such as to require the judge to recuse himself.[26] It also conflicts in principle with this Court's own pre-§ 455(a) adoption of the "appearance of propriety" standard of judicial conduct in *Commonwealth Coatings Corp.* v. *Continental Casualty Co*, 393 U.S. 145 (1968).

c) The refusal below to consider the Yochelson affidavit is in conflict in principle with the receipt of psychiatric evidence in all types of civil and criminal cases on issues of mental state, capacity and competence. *In particular*, in *Green* v. *Murphy*, 259 F.2d 591 (3 Cir. 1958) psychiatric evidence similar to that here was received and considered on a § 144 issue; See Forer, "Psychiatric Evidence in the Recusation of Judges", 73 Harvard L. Rev. 1325 (1960), which, after reviewing the *Green* case, concludes that ". . . when the judge is presented with the opinion of a psychiatrist that the facts alleged give rise to an inference of prejudice, he should recuse himself, or if he is not yet willing to do so, he should be required to seek further psychiatric evidence from other experts. If this evidence substantiates that presented by the movant, withdrawal of the judge should be mandatory."

d) The Ninth Circuit refusal to review the disqualification issue on its merits *now* is in square

[26] The *Rapp* Court said, and the Tenth Circuit in *Texaco* reiterated that: ". . . the proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a detached impartiality. Litigants are entitled, moreover, to a judge whose unconscious response in the litigation may be struck only in the observing presence of all parties and their counsel." 350 F.2d at 812; 354 F.2d at 657.

conflict with the Seventh Circuit's ruling in *SCA Services, Inc* v. *Morgan*, 557 F.2d 110, 117 (7 Cir. 1977) that "the specificity and legislative intent of Section 455 are sufficiently different from Section 144 as to warrant a departure from our previous position" that mandamus is not available to review a district judge's decision under § 144.[27]

This Ninth Circuit stance is contrary also to this Court's own recognition in *Berger* v. *United States*, 252 U.S. 22, 36 (1921) that appellate review of a judicial disqualification issue *after* disposition on the merits is futile—i.e.,

> ". . . The remedy by appeal is inadequate. It comes after the trial, and if prejudice exists, it has worked its evil, and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient."

As well articulated in *Massie* v. *Commonwealth*, 393 Ky. 588, 20 S.W. 704 (Ct. App. 1892),

> ". . . There are many ways that a partial or prejudiced judge may knife a party . . . without it appearing from the record, or without his being able to ascertain the act."

The insidious way in which a partial judge can change the complexion of a case while it is ripening for appeal—and thus preclude the litigant he dis-

[27] The Seventh Circuit was formerly one of a minority of federal appellate courts holding mandamus unavailable to review a judicial disqualification issue, e.g. *Action Realty Co.* v. *Will*, 427 F.2d 843, 845 (7 Cir. 1970). The Ninth Circuit, by contrast, stood with the majority of circuits in holding mandamus a proper way of reviewing a judge's refusal to disqualify himself—e.g. *In re Honolulu Consolidated Oil Co.*, 243 F. 348 (9 Cir. 1917); *Connelly* v. *United States District Court*, 191 F.2d 692 (1951); *Gladstein* v. *McLaughlin*, 230 F.2d 762 (9 Cir. 1955)—until recently. See its *Bauman* decision *supra*, note 11.

favors from having a proper record for ultimate review,[28] is also well summed up by Goldberg and Levenson, quoting Dean Wigmore, in "Lawless Judges" (1969) at 230, as follows:

> "The public does not fully understand the position of the judge in respect to his immunity from exposure by the bar. His iniquities or incompetencies, if any, are so committed as to become directly known only to a few persons in any given instance; and these few persons are the attorneys in charge of the case. To bear upon testimony against him now is to risk professional ruin at his hands in the near future. Moreover, this ruin can be perpetuated by him without fear of the detection of his malice, because a judge's decision can be openly placed upon plausible grounds, while secretly based on the resolve to disfavor the attorney in the case."

While turning a deaf ear and a blind eye to such district court abuses may save appellate time in the short run—certainly a desideratum in the overloaded Ninth Circuit—it obviously compounds the chance that the ultimate appeal will be unable to redress the district court's wrong. Moreover, if the appeal *does* result in the redress minimally required under the constitutional guarantee of fair trial before a fair and impartial tribunal—to wit, reversal and remand for a new trial before a different judge—the short term conservation of appellate judicial resources will be more than compensated by the long term squandering of district court time and manpower and the unnecessary public expense of two trial court proceedings.

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[28] By repeatedly making inaccurate fact findings in pretrial orders and refusing to correct these errors when they are drawn to his attention, Judge Curtis is engaged in improperly altering the ultimate appellate record in *this* case to petitioner's detriment and defendants' unfair advantage.

> And, even if the present Ninth Circuit policy of postponing review of judicial disqualification issues *could* be shown to be more efficient, a policy that sacrifices the constitutional right of fair trial before an impartial tribunal on the altar of short-term expediency merits careful scrutiny in this Court *before* its implementation becomes routine in any lower court.

3. *The Ninth Circuit is in need of this Court's supervision to correct its demonstrated insensitivity toward judicial breaches of ethics and its demonstrated reluctance to supervise its district judges.*

Bauman, supra, eloquently describes the Ninth Circuit's current disinclination to supervise its district judges or curb any propensities they may exhibit toward capricious and arbitrary behavior, including frolics of their own outside the rules which define current standards of due process requisite to a fair trial, and habitual breaches of judicial ethics.

For example, the record below and that in No. 77-4,[29] *Amalgamated Sugar Co.* v. *United States District Court for Northern California* show that at least three district judges within the Ninth Circuit—to wit, Judges Curtis, Pence and Boldt—customarily pay no attention at all to Canon 3A4 of the Code of Judicial Conduct and its prohibition against *ex parte* communications.[30]

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[29] Filed July 1, 1977; certiorari denied October 3, 1977.

[30] Interestingly, Thode, "Reporter's Notes to the Code of Judicial Conduct" (1973)—universally acknowledged as an authoritative part of the Code's "legislative history"—observes that "In an adversary proceeding *ex parte* communications by the judge to a party or his lawyer or by a party or his lawyer to the judge clearly should be precluded" (p. 53) and warns that "A judge receiving a communication about a case that is not before him should . . . be aware that if the proceeding does come before him, in the future, any present communication about the proceeding might require his disqualification at that future point by reason of Canon 3C(1). . . ." (*ibid.*). Canon 3C(1) is worded identically to § 455(a).

As another example, Judges Curtis and Pence have also demonstrated callous disregard for Canon 3A3's requirement that "A judge should be patient, dignified and courteous to [those] . . . with whom he deals in his official capacity." Judge Pence even went so far as to suggest that a judge's First Amendment right of free speech effectively permits him to speak as he pleases,[31] on the record of any case—and thereby obviously nullifies this Canon in his view.

A further example may be seen in the disdain of Judges Curtis and Pence—and at least implicitly of the Ninth Circuit itself—for the judicial oath set out in 28 U.S.C. 453 and for Canons 2A and 3 of the Judicial Code. This disdain is manifest in Judge Curtis' repeated entry of inaccurate fact findings and his undeviating refusals to correct them when they are affirmatively called to his attention [32]—and in the tolerance that Judge Pence expressly, and the Ninth Circuit tacitly, accord to this misconduct.

This situation is grave. It can be judicially corrected, if at all, only by this Court.

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[31] Said Judge Pence, in excusing Judge Curtis' continued *ad hominem* attacks, unnecessary to any ruling, on the good faith of petitioner and its counsel, ". . . there is nothing in any of the rules or regulations or laws that was ever intended to deny to judges of the court the same First Amendment rights enjoyed by those who are not judges of the court". (App., p. 19a).

[32] Petitioner is ready to accept that in some instances, the original inaccurate finding *may* have resulted from inadvertent error. The refusal to make corrections when petitioner sought them and incontrovertibly demonstrated the true facts, however, is deliberate—and it mocks the judicial duty of fidelity to the truth.

CONCLUSION

The writ should be granted as asked.

Respectfully submitted,

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